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Her Honor: An Islamic Critique of the Rape Laws of Pakistan from a Woman-Sensitive Perspective

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HER HONOR: AN ISLAMIC CRITIQUE OF THE RAPE LAWS OF PAKISTAN FROM A WOMAN-SENSITIVE PERSPECTIVE

*Asifa Quraishi**

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INTRODUCTION

I remember as a child having to describe Pakistan as that small country next to India. I haven't used that description in a long time. By now, Americans have heard of Pakistan, and the reference is no longer exotic. Instead, the name conjures up confused images of women and non-Muslims in a third world country struggling to battle Islamic fundamentalism. Recent reports of the unjust application of Pakistan's rape

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laws, enacted as part of the "Islamization" of Pakistani law, further cement the impression that Islam is bad for women. These reports, unfortunately, are true. The impression is not.

This article critiques the rape laws of Pakistan from an Islamic point of view which is careful to include women's perspectives in its analysis. Unlike much of what is popularly presented as traditional Islamic law, this woman-affirming Islamic approach will reveal the inherent gender-egalitarian nature of Islam, which is too often ignored by its academics, courts, and legislatures. This article will demonstrate how cultural patriarchy has instead colored the application of certain Islamic laws in places like Pakistan, resulting in the very injustice which the Quran so forcefully condemns.

I. CRITIQUE OF THE ZINA ORDINANCE

A. *Power of Law: The Zina Ordinance and Its Application in Pakistan*

In 1977, under President Zia-ul-Haq, Pakistan enacted a set of "Hudood"¹ ordinances, ostensibly to bring the laws of Pakistan into "conformity with the injunctions of Islam."² These ordinances, setting forth crimes such as theft, adultery, slander, and alcohol consumption, became effective in February, 1979.³ The "Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979" (*Zina Ordinance*) criminalizes "zina," or "extramarital sexual relations" (also a crime under Islamic law).⁴ The *Zina Ordinance* states:

A man and a woman are said to commit 'zina' if they wilfully have sexual intercourse without being validly married to each other.

1. The word "hudood" is the plural of "hadd," a term denoting the Islamic legal categorization of crimes for which the definition and punishment is set by God. See 'ABDUR RAHMAN I. DOI, *SHARI'AH: THE ISLAMIC LAW* 221 (1984).

2. Offence of Zina (Enforcement of Hudood) Ordinance No. VII of 1979, PmbI. [hereinafter *Zina Ordinance*]. The text of the Ordinance can be found in THE ALL PAKISTAN LEGAL DECISIONS [P.L.D.] 1979 Cent. Statutes 51 (Pak.); ASHFAQ BOKHARY, *LAW RELATING TO HUDOOD CASES* 162 (1979); *The Islamic Criminal Laws*, in THE MAJOR ACTS 10 (1992) [hereinafter MAJOR ACTS].

3. See *Zina Ordinance* § 1 (stating commencement date); P.L.D. 1979 Cent. Statutes at 51; BOKHARY, *supra* note 2, at 164; MAJOR ACTS, *supra* note 2, at 10.

4. This article will not address the rationale or propriety of criminalizing consensual sexual relations, whether under Islamic law or under the many other penal codes of the world which criminalize such behavior. Rather, the focus of the present study is the law of nonconsensual sexual relations laid out in the *Zina Ordinance* in Pakistan and as addressed in Islamic jurisprudence.

Zina is liable to *hadd* [punishment] if—

- (a) it is committed by a man who is an adult and is not insane with a woman to whom he is not, and does not suspect himself to be married; or
- (b) it is committed by a woman who is an adult and is not insane with a man to whom she is not, and does not suspect herself to be married.⁵

Under its heading of *zina*, the *Zina* Ordinance includes the category “*zina-bil-jabr*” (*zina* by force) which lays out the definition and punishment for sexual intercourse against the will or without the consent of one of the parties. The section articulating the crime of rape, as *zina-bil-jabr*, states:

A person is said to commit *zina-bil-jabr* if he or she has sexual intercourse with a woman or man, as the case may be, to whom he or she is not validly married, in any of the following circumstances, namely:—

- (a) against the will of the victim,
- (b) without the consent of the victim,
- (c) with the consent of the victim, when the consent has been obtained by putting the victim in fear of death or of hurt, or
- (d) with the consent of the victim, when the offender knows that the offender is not validly married to the victim and that the consent is given because the victim believes that the offender is another person to whom the victim is or believes herself or himself to be validly married.

Explanation.—Penetration is sufficient to constitute the sexual intercourse necessary to the offence of *zina-bil-jabr*.

Zina-bil-jabr is *zina-bil-jabr* liable to *hadd* if it is committed in the circumstances specified [above].⁶

5. *Zina* Ordinance §§ 4, 5; P.L.D. 1979 Cent. Statutes at 52; BOKHARY, *supra* note 2, at 176 (with comment and annotations); MAJOR ACTS, *supra* note 2, at 11.

6. *Zina* Ordinance § 6; P.L.D. 1979 Cent. Statutes at 52; BOKHARY, *supra* note 2, at 182 (with comment and annotations); MAJOR ACTS, *supra* note 2, at 11–12.

Finally, the *Zina* Ordinance then specifies the evidence required to prove both *zina* and *zina-bil-jabr*:

Proof of *zina* or *zina-bil-jabr* liable to *hadd* shall be in one of the following forms, namely:—

(a) the accused makes before a Court of competent jurisdiction a confession of the commission of the offence; or

(b) at least four Muslim adult male witnesses, about whom the Court is satisfied, having regard to the requirements of *tazkiyah al-shuhood* [credibility of witnesses], that they are truthful persons and abstain from major sins (*kabair*), give evidence as eyewitnesses of the act of penetration necessary to the offence[.]⁷

When this law was enacted in 1977, proponents argued that it codified the Islamic law of illegal sexual relations. The accuracy of that claim is addressed in detail later.⁸ First, it is important to note that the application of the *Zina* Ordinance in Pakistan has placed a new twist and a renewed urgency on the question of its validity. The twist is this: when a *zina-bil-jabr* case fails for lack of four witnesses, the Pakistani legal system has more than once concluded that the intercourse was therefore consensual, and consequently has charged rape victims with *zina*.

A few disturbing cases will illustrate the concern. In 1982, fifteen-year-old Jehan Mina became pregnant as a result of a reported rape. Lacking the testimony of four eyewitnesses that the intercourse was in fact rape, Jehan was convicted of *zina* on the evidence of her illegitimate pregnancy.⁹ Her child was born in prison.¹⁰ Later, a similar case caused public outcry and drew public attention to the new law. In 1985, Safia Bibi, a sixteen-year-old nearly blind domestic servant reported that she was repeatedly raped by her landlord/employer and his son, and

7. *Zina* Ordinance § 8; P.L.D. 1979 Cent. Statutes at 53; BOKHARY, *supra* note 2, at 192 (with comment and annotations); MAJOR ACTS, *supra* note 2, at 12. I have not included the punishments specified for each crime, as that is not within the focus of this article. Here, I am primarily concerned with the definition and categorization of each of these offenses. Briefly, however, the *hadd* punishment prescribed in the ordinance for a *zina* offense is either public stoning or whipping. For a *zina-bil-jabr* conviction, it prescribes imprisonment and/or fine and/or public whipping. See *Zina* Ordinance § 6. See also *infra* note 25 for citations to discussions of punishments for *zina* in Islamic law.

8. See *infra* Parts I.B., II.

9. Jehan Mina v. The State, P.L.D. 1983 Fed. Shariat Ct. 183 (Pak.).

10. See Rubya Mehdi, *The Offence of Rape in the Islamic Law of Pakistan*, 18 INT'L J. Soc. & L. 19, 26 (1990).

became pregnant as a result. When she charged the men with rape, the case was dismissed for lack of evidence, as she was the only witness against them. Safia, however, being unmarried and pregnant, was charged with *zina* and convicted on this evidence.¹¹

Short of conviction, women have also been held for extended periods of time on charges of *zina* when they allege rape.¹² For example, in July, 1992, Shamim, a twenty-one-year-old mother of two, charged that she was kidnaped and raped by three men in Karachi. When a rape complaint was lodged against the perpetrators, the police instead arrested Shamim, and charged her with *zina* when her family could not post the fee set for her release. The police held her in custody for six days, during which she reports that she was repeatedly raped by two police officers and a third unnamed person.¹³ Numerous women have reported similar custodial rapes in Pakistan.¹⁴

Police action and inaction in rape cases in Pakistan have in fact been widely reported as instrumental elements to the injustice. There is evidence that police have deliberately failed to file charges against men accused of rape, often using the threat of converting the rape charge into a *zina* prosecution against the female complainant to discourage women from reporting.¹⁵ And when the perpetrator is a police officer himself,

11. See *Safia Bibi v. The State*, P.L.D. 1985 Fed. Shariat Ct. 120 (Pak.). She was sentenced to fifteen lashes, three years imprisonment, and a fine. Public outrage eventually led the appellate court to set aside the punishment. See RASHIDA PATEL, *SOCIO-ECONOMIC POLITICAL STATUS AND WOMEN AND LAW IN PAKISTAN* 25–26 (1991); Ayesha Jalal, *The Convenience of Subservience: Women and the State in Pakistan*, in *WOMEN, ISLAM AND THE STATE* 102 (Deniz Kandiyoti ed., 1991); Mehdi, *supra* note 10, at 19, 24–26; Shahid Reman Khan, *Under Pakistan's Form of Islamic Law, Rape is a Crime—For the Victims*, L.A. TIMES, May 25, 1986, § 1, at 27 (reporting Bibi case, and another similar case).

12. See ASIA WATCH & WOMEN'S RIGHTS PROJECT, HUMAN RIGHTS WATCH, *DOUBLE JEOPARDY: POLICE ABUSE OF WOMEN IN PAKISTAN* 41–60 (1992) [hereinafter *DOUBLE JEOPARDY*].

13. See AMNESTY INT'L, *PAKISTAN: TORTURE, DEATHS IN CUSTODY AND EXTRAJUDICIAL EXECUTIONS* 11–12 (1993) [hereinafter *TORTURE*].

14. See *DOUBLE JEOPARDY*, *supra* note 12; PATEL, *supra* note 11, at 36; Mehdi, *supra* note 10, at 27 (1990) (citing report by attorney Asma Jahangir of fifteen incidents of police rape of women in detention in 1988/1989); Seminar, *Adultery and Fornication in Islamic Jurisprudence: Dimensions and Perspectives*, 2 ISLAMIC & COMP. L.Q. 267, 286–87 (1982) (convenor Tahir Mahmood noting “cases of rape . . . in private (including those committed by policemen) are alarmingly on an increase in the [Indo-Pakistani] subcontinent.”).

15. See, e.g., AMNESTY INT'L, *PAKISTAN, THE PATTERN PERSISTS: DEATHS IN CUSTODY, EXTRAJUDICIAL EXECUTIONS, AND “DISAPPEARANCES” UNDER THE PPP GOVERNMENT* 35 (1995) [hereinafter *PATTERN PERSISTS*] (reporting January 17, 1994, gang rape of five women, stating that police pressured women to report only robbery, and conceal rape); *TORTURE*, *supra* note 13, at 11–12 (citing Shamim case, and similar Imammat Khatoon case). In 1992, more than 2,000 women were in jail awaiting trial for *zina*. See *DOUBLE JEOPARDY*, *supra* note 12, at 69. Many women are eventually acquitted after enduring long trials. See PATEL, *supra* note 11, at 28.

the chances of pursuing a case against him are nearly nonexistent. Shahida Parveen faced this very situation when she reported that in July, 1994, two police officers broke into her house and locked her children in a room while they raped her at gunpoint. A medical examination confirmed that she was raped by more than one person, but the police refused to register her complaint.¹⁶

Political rivals have further exploited women by using rape as a weapon against each other. In November, 1992, Khursheed Begum, the wife of an arrested member of the Pakistan People's Party was abducted on her way home from attending her husband's court hearing. She states that she was blindfolded, driven to a police station, and repeatedly raped there by police officers, who asserted political motives for the attack.¹⁷ Later that same month, forty-year-old Veena Hayat, a member of one of Pakistan's elite families and daughter of a prominent politician, stated that she was gang raped for twelve hours in every room of her house by five armed men. Despite her father taking the unusual social risk of publicly reporting the attack, a judicial investigation concluded that there was insufficient evidence to convict the alleged perpetrators.¹⁸

Cases such as these, resulting from the unfortunate application of the *Zina* Ordinance, are reported widely in the Western media.¹⁹ The issue is now a primary topic in women's and human rights discussions globally,²⁰

16. PATTERN PERSISTS, *supra* note 15, at 14.

17. AMNESTY INT'L, AMNESTY INTERNATIONAL REPORT 1992 207 (1992) [hereinafter 1992 REPORT]; Deborah Scroggins, *Playing the Power Game with Rape Series: Women of the Veil*, VANCOUVER SUN, July 13, 1992, at A10, available in 1992 WL 5936212. See also Ahmed Rashid, *Rape Scandal Rocks Pakistan: Ahmed Rashid in Islamabad on a Gang Attack that is Exposing a Rotten State Machine*, INDEPENDENT (London), Dec. 29, 1991, at 14.

18. See AFIYA SHEHRBANO ZIA, SEX CRIME IN THE ISLAMIC CONTEXT: RAPE, CLASS AND GENDER IN PAKISTAN 55-57 (1994). See also Asia: Pakistan, ECONOMIST, Dec. 14, 1991, at 43; Rashid, *supra* note 17, at 14; Melissa Robinson, *Unveiled: Rape in Pakistan*, NEW REPUBLIC, Mar. 9, 1992, at 11.

19. See, e.g., John Branion, Note, *Recent Development: A World of Rape*, 2 UCLA WOMEN'S L.J. 275, 276 (1992); Mary Curtius, *Report Blasts Global Abuse of Women's Rights; 'Conflict Zone' Governments Found to be Worst Offenders*, BOSTON GLOBE, Mar. 8, 1994, at 2; Mark Fineman, *Pakistan Women Fear New Islamic Law May Blunt Struggle for Rights*, L.A. TIMES, July 2, 1988, at pt. 1, 5; Lori Heise, *When Women are Prey; Around the World, Rape is Commonplace—and the Victims Can't Fight Back*, WASH. POST, Dec. 8, 1991, at C1; Aslam Khan, *Zia's "Islamic Democracy": Leading Pakistan into the Past*, NATION, June 29, 1985, at 791; Khan, *supra*, note 11, at 27; O.J. Simpson fits Stereotype: Religious Fundamentalism Appears to Breed More Violence Toward Women, BUS. WIRE, Jan. 30, 1995, available in LEXIS, News Library, Curnws File; Rashid, *supra*, note 17, at 14; Robinson, *supra* note 18, at 11; Scroggins, *supra*, note 17, at A10; Katharine Whitehorn, *The Apartheid of Gender*, OBSERVER (London), June 19, 1994, at 23.

20. See, e.g., U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1993 1370, 1382 (1994); AMNESTY INT'L, AMNESTY INTERNATIONAL REPORT 1994 232-33 (1994); AMNESTY INT'L, WOMEN IN PAKISTAN: DISADVANTAGED AND DENIED THEIR

and stirs up an expected share of frustration, anger, defensiveness, and arrogance from all sides. The debate, however, begs the question: What *is* the Islamic law of rape? Any real substantive analysis of the *zina-bil-jabr* law and its application must first be approached from this framework—the same framework upon which the law purports to base itself. I will therefore ask the critical question: does Pakistan's *Zina* Ordinance accurately articulate the Islamic law of rape?

B. Law of God: the Quran on Zina

The Pakistani *Zina* Ordinance subsumes rape—as *zina-bil-jabr*—under the general *zina* law of unlawful sexual relations. To analyze the appropriateness of this categorization, we must first analyze the Islamic law of *zina* itself. The preamble of the Pakistani *Zina* Ordinance states that it is enacted “to modify the existing law relating to *zina* so as to bring it in conformity with the Injunctions of the Holy Quran and Sunnah.”²¹ Indeed, the term *zina* itself appears in the Quran. In warning generally against the dangers of adultery, the Quran states:

And do not go near fornication [*zina*] as it is immoral and an evil way.²²

Later, the Quran more specifically sets out actual legal prescriptions criminalizing illegal sexual relations:

The adulteress and adulterer should be flogged a hundred lashes each, and no pity for them should deter you from the law of God,

RIGHTS (1995) [hereinafter DISADVANTAGED]; DOUBLE JEOPARDY, *supra* note 12, at 53–60; 1992 REPORT, *supra* note 17, at 207–08; PATEL, *supra* note 11, at 27–30 (citing activities of All Pakistan Women's Association, Pakistan Women Lawyers' Association, Pakistan Women's Rights Committee); PATTERN PERSISTS, *supra* note 15, at 14, 35; TORTURE, *supra* note 13, at 10–13; Jalal, *supra* note 11, at 103–09 (describing activities of Women's Action Forum in Karachi); Peregrine Hodson, *Bhutto Appeals for Reward over Moderate Stand*, TIMES (London), Nov. 26, 1994, at 16 (quoting Prime Minister Bhutto urging a change of the *zina* laws); Anwar Iqbal, *Bhutto Seeks Laws Against Rape*, U.P.I., Aug. 1, 1995, available in LEXIS, News Library, Upi File; Bushra Jabbar, *The Reality of Rape*, ECON. REV. (Pak.), July 1991, at 7–8; Beena Sarwar, *Pakistan-Women: Bhutto Campaigns Against Domestic Violence*, INTER PRESS SERVICE, July 12, 1995, available in LEXIS, News Library, Inpres File.

21. *Zina* Ordinance, PmbI.; MAJOR ACTS, *supra* note 2, at 10. “Sunnah” is a term used to describe the traditions of Prophet Muhammad. See MOHAMMAD HASHIM KAMALI, PRINCIPLES OF ISLAMIC JURISPRUDENCE 44 (2d ed. 1991).

22. *Quran* 17:32. Another verse generally urging against fornication states:

Devotees of Ar-Rahman [The Merciful] are those . . . who do not invoke any god apart from God; who do not take a life which God has forbidden except for a cause that is just, and do not fornicate [*zina*—and any one who does so will be punished for the crime.

Id. at 25:63, 68. Note that all English renditions of the Quranic verses cited in this article come from the Ahmed Ali translation, published as *Al-Qur'an* (Ahmed Ali trans., 1984).

if you believe in God and the Last Day; and the punishment should be witnessed by a body of believers.²³

Following this definition of the offense are extremely strict evidentiary rules for the proof of such a crime:

Those who defame chaste women and do not bring four witnesses should be punished with eighty lashes, and their testimony should not be accepted afterwards, for they are profligates.²⁴

Thus, after criminalizing extramarital sexual relations,²⁵ the Quran simultaneously attaches to the prosecution of this crime nearly insurmountable evidentiary restrictions: four eyewitnesses are required to prove a charge of sexual misconduct.²⁶

23. *Id.* at 24:2.

24. *Id.* at 24:4. The verse goes on to specify a relaxed evidentiary standard between spouses, understandable given the personal nature such an accusation would have on the marital relationship:

Those who accuse their wives and do not have any witnesses except themselves, should swear four times in the name of God, the testimony of each such person being that he is speaking the truth.

And (swear) a fifth time that if he tell a lie, the curse of God be on him.

The woman's punishment can be averted if she swears four times by God as testimony that her husband is a liar.

Her fifth oath being that the curse of God be on her if her husband should be speaking the truth.

Id. at 24:6-9. For further discussion of this spousal *zina* situation, see 'ABDUR RAHMAN I. DOI, *WOMEN IN Shari'ah (ISLAMIC LAW)* 126-28 (1989); KAMALI, *supra* note 21, at 156; AL-IMAM MUHAMMAD IBN IDRIS AL-SHAFI' I, *AL-RISALA [TREATISE ON THE FOUNDATIONS OF ISLAMIC JURISPRUDENCE]* 146-47 (Majid Khadduri trans., 2d ed. 1987). Note that here, there is no discrepancy in weight of testimony based on the gender of the party, because in a charge of adultery between spouses, a woman's word is equal to that of a man.

25. As noted earlier, this article does not address the punishments prescribed for the crime of *zina*. See *supra* note 7. Interestingly, the answer is not as concrete as these verses might imply. Traditions of the Prophet Muhammad involving the stoning of adulterers have created much debate among Islamic jurists regarding the role of the death penalty and corporal punishment in *zina* sentencing. See, e.g., SAYED HASSAN AMIN, *ISLAMIC LAW IN THE CONTEMPORARY WORLD* 27-28 (1985) (citing a 1981 Pakistan *Shari'ah* (Islamic law) Court ruling that stoning for adultery is not correct Islamic practice); BOKHARY, *supra* note 2, at 181 (citing legal debate in Pakistan over propriety of stoning as punishment for adultery). The focus of this study, however, is limited to the definition of the crime itself, and the categorization of rape as *zina*. The topic of what punishment the state should inflict upon those convicted of such a crime must wait for another day.

26. See DOI, *supra* note 1, at 236-40 (summarizing crime of *zina*); DOI, *supra* note 24, at 117-28 (summarizing crime of *zina*); MOHAMED S. EL-AWA, *PUNISHMENT IN ISLAMIC LAW* 13-15 (1982) (general discussion of *zina* law as laid down in Quranic verses). The "proof of *zina*" section of the *Zina* Ordinance, which also requires four witnesses, comes to mind. Thus, in setting *zina* as a crime in Pakistani law, and requiring four witnesses as necessary proof of

Islamic jurisprudence further interprets the Quranic *zina* evidentiary rule of quadruple testimony to require the actual witnessing of penetration during sexual intercourse, and nothing less.²⁷ This interpretation is based on the reported *hadith* (tradition) of the Prophet Muhammad in which, after a man persisted in confessing to adultery (the Prophet having turned away to avoid hearing the information several times prior), Muhammad asked several specific questions to confirm that the act was indeed sexual penetration.²⁸ Moreover, Islamic evidence law requires the witnesses to be mature, sane, and of upright character.²⁹ Furthermore, if any eyewitness testimony was obtained by violating a defendant's privacy, it is inadmissible.³⁰ And, lastly, the *Hedaya*, a key reference of Hanafi jurisprudence³¹ prominent in Muslim India,³² even sets a statute of limitations for charging *zina*.³³

such a crime, the Ordinance does in fact appear to be based, at least in structure, on Islamic law. However, as discussed in the following sections, the details of the *Zina* Ordinance, and especially its subcategorization of rape as a type of *zina* is not Islamic law.

27. See NOEL J. COULSON, A HISTORY OF ISLAMIC LAW 127 (1994); DOI, *supra* note 24, at 122; MUHAMMAD IQBAL SIDDIQI, THE PENAL LAW OF ISLAM 69 (2d ed. 1985); M. Cherif Bassiouni, *Sources of Islamic Law, and the Protection of Human Rights in the Islamic Criminal Justice System*, in THE ISLAMIC CRIMINAL JUSTICE SYSTEM 5 (M. Cherif Bassiouni ed., 1982) (citing the rule of thumb that a hypothetical thread must not have been able to pass through the two bodies); Seminar, *supra* note 14, at 271.

28. See 8 SAHIH AL-BUKHARI, Bk. 82, Nos. 806, 810, 812-814, at 528-35 (Muhammad Muhsin Khan trans., 1985) [hereinafter AL-BUKHARI], 3 SUNAN ABU DAWUD, Nos. 4413-4414 (Ahmad Hasan trans., 2d ed. 1990) [hereinafter ABU DAWUD]. It is interesting to note that although the man was punished based on his confession, the woman was apparently never prosecuted or even investigated. The significance of this point will be apparent later, in the discussion of the context of the Quranic verses on *zina*, and their impact on women's privacy. See *infra* notes 39-51 and accompanying text.

29. See Ma'amoun M. Salama, *General Principles of Criminal Evidence In Islamic Jurisprudence*, in THE ISLAMIC CRIMINAL JUSTICE SYSTEM, *supra* note 27, at 109, 116-20. See also EL-ÅWA, *supra* note 26, at 126-27; SIDDIQI, *supra* note 27, at 43-49.

30. See Osman Abd-el-Malek al-Saleh, *The Right of the Individual to Personal Security in Islam*, in THE ISLAMIC CRIMINAL JUSTICE SYSTEM, *supra* note 27, at 55, 69-70 (citing an incident where the Caliph Omar ibn al Khattab and a companion passed a party in which, behind locked doors, individuals were drinking alcohol; because of Islamic injunctions against spying, the two disregarded the private party and returned home). See also SIDDIQI, *supra* note 27, at 19-20 (citing requirement to knock before entering a residence, even of family). But see THE HEDAYA OR GUIDE: A COMMENTARY ON THE MUSSULMAN LAWS, Bk. VII, Ch. III, at 194 (Charles Hamilton trans., 1982) (allowing evidence unlawfully obtained) [hereinafter HEDAYA].

31. See *infra* note 53 for an explanation of the Islamic schools of law.

32. See SOBHI MAHMASSANI, FALSAFAT AL-TASHRI FI AL-ISLAM [THE PHILOSOPHY OF JURISPRUDENCE IN ISLAM] 23, 49 (Farhat J. Ziadeh trans., 1987), for history and significance of the HEDAYA.

33. HEDAYA, *supra* note 30, Bk. VII, Ch. II, at 188. This statute of limitations, significantly, does not apply to a charge of slander. *Id.* In addition to the above restrictions, where a *zina* conviction is a result of confession rather than testimony, the confession may be retracted at any time (including during execution of the sentence). See Salama, *supra* note 30, at 120.

Why so many evidentiary restrictions on a criminal offense prescribed by God? Islamic scholars posit that it is precisely to *prevent* carrying out punishment for this offense. By limiting conviction to only those cases where four individuals actually saw sexual penetration take place, the crime will realistically only be punishable if the two parties are committing the act in public, in the nude. The crime is therefore really one of public indecency rather than private sexual conduct.³⁴ That is, even if four witnesses saw a couple having sex, but under a coverlet, for example, this testimony would not only fail to support a *zina* charge, but these witnesses would also be liable for slander.³⁵ Thus, while the Quran condemns extramarital sex as an evil, it authorizes the Muslim legal system to prosecute someone for committing this crime *only* when the act is performed so openly that four people see them without invading their privacy. As Cherif Bassiouni states, “[t]he requirement of proof and its exigencies lead to the conclusion that the policy of the harsh penalty is to deter public aspects of this form of sexual practice.”³⁶

This analysis is consistent with the tone of the Quranic verses which immediately follow the above verses regarding *zina*. After the verses establishing the crime and the attendant standard of proof, the Quran states:

Those who spread lies were a clique among you. Do not think it was bad for you: In fact it has been good for you. Each of them will pay for the sin he has committed, and he who had greater share (of guilt) will suffer grievous punishment.

Why did the faithful men and women not think well of their people when they heard this, and [say] “This is a clear lie?”

Why did they not bring four witnesses (in support of their charge)? And since they did not bring the four witnesses, they are themselves liars in the sight of God.

34. See Salama, *supra* note 29, at 118, n.* (“[t]he nature of such rigorous proof makes it a crime of public indecency rather than adultery.”).

35. See *Quran* 24:4 (stating that those who charge women with *zina* and do not have four witnesses should be given eighty lashes and their testimony should not be accepted thereafter). See also 13 THE HISTORY OF AL-TABARI 110–14 (Gautier H. A. Juynboll trans., 1989) (describing incident where Caliph Umar punished witnesses supporting *zina* charge against al-Mughirah b. Shu’bah, Governor of Basra, because of conflicting details in their testimony of eyewitnessed act).

36. Bassiouni, *supra* note 27, at 6. See also EL-AWA, *supra* note 26, at 17 (“The desire to protect public morality and to safeguard it against corruption by publicizing the offense, is the reason for limiting the methods of proof.”); EL-AWA, *supra* note 26, at 20 (“This punishment is prescribed in fact for those who committed the crime openly . . . with no consideration for the law or for the feeling of the community,” quoting MUHAMMAD MUSTAFA SHALABI, AL-FIQH AL-ISLAMI BAYN AL-MITHALIYA AL-WAQI’YA 201 (1960)).

Were it not for the grace of God and His mercy upon you in this world and the next, you would have suffered a great affliction for the false accusation.

When you talked about it and said what you did not know, and took it lightly—though in the sight of God it was serious—

Why did you not say when you heard it: “It is not for us to speak of it? God preserve us, it is a great calumny!”

God counsels you not to do a thing like this, if you are believers.³⁷

The Quran’s call to respond to charges of sexual misconduct with “it is not for us to speak of it” echoes the *hadith* in which the Prophet Muhammad was reluctant to take even a man’s confession of adultery.³⁸ The Quran contemplates a society in which one does not engage in publicizing others’ sexual indiscretions. Quranic principles honor privacy and dignity over the violation of law, except when a violation becomes a matter of public indecency.

Placing these Quranic verses into context will further emphasize the importance of this concept in Islamic law, and in particular, its close connection to the dignity of women. The verses setting forth the crime of *zina* and the accompanying verses denouncing public discussion of the matter were revealed just after the famous “Affair of the Necklace,” in which the Prophet Muhammad’s wife, Aisha, was mistakenly left behind by a caravan in the desert when she went looking for a lost necklace.³⁹ She returned home with a young single man who had happened upon her and given her a ride home. Rumors of Aisha’s time alone with this man spread quickly throughout the small town of Medina, until the above verses finally ended the gossip. Thus, the very revelation of these verses was prompted by an incident involving attacks on a woman’s dignity—Aisha’s honor. Indeed, the verse setting forth severe punishment for slander is directed specifically against charges impugning a woman’s chastity: “Those who defame chaste women, and do not bring four

37. *Quran* 24:11–17.

38. See *supra* text accompanying note 28.

39. See 18 AL-TABARI, JAMI’ AL-BAYAN ‘AN TA’WIL AY AL-QUR’AN 86–101 (1910), cited in D.A. SPELLBERG, POLITICS, GENDER, AND THE ISLAMIC PAST: THE LEGACY OF ‘AISHA BINT ABI BAKR 82 (1994); 2 AKRAM DIYA AL ‘UMARI, MADINAN SOCIETY AT THE TIME OF THE PROPHET 82–84 (Huda Khattab trans., 1991). Note that this is a primarily *Sunni* account of the context of these verses. Many *Shii* scholars do not attribute these verses to the “Affair of the Necklace” incident. SPELLBERG, *supra*, at 81–82 (citing *Shii* author al-Qummi, but also noting *Shii* author al-Tabarsi, who took the *Sunni* position).

witnesses, should be punished with eighty lashes, and their testimony should not be accepted afterwards"⁴⁰ Men do not seem to be of particular concern here.

Why the focus on women? Looking at the issue from a cultural perspective, this focus is not surprising. In nearly every culture of the world, women's sexual morality appears to be a particularly favorite subject for slander, gossip, and insult.⁴¹ The tendency of patriarchal societies, in fact, is to view a woman's chastity as central to the honor of her family, especially the men in her family. For example, under British common law (the law in Pakistan before the *Hudood* Ordinance), rape was a crime punishable against men, to be lodged by the husband of the woman raped against the man who violated her.⁴² The woman's place was apparently on the sidelines of a prosecution by her husband against her rapist.

This cultural phenomenon—that a family's honor lies in the virtue of its women—exists in many countries today; Pakistan is one of them. Studies indicate that in Pakistan, when women are jailed for long periods of time on charges of *zina*, their families and friends are reluctant to help or even visit them, "as accusation of *zina* is a serious dishonour."⁴³ Even more disturbing, suicide is perceived as the honorable solution to the humiliation, especially when sexual violation is involved. For example, when Khursheed Begum was raped in 1992,⁴⁴ her husband and son "wish[ed] she had committed suicide," even after human rights activists explained to them that the rape was not her fault.⁴⁵ This attitude lends

40. *Quran* 24:4 (emphasis added).

41. See, e.g., DALE SPENDER, *MAN MADE LANGUAGE* (1980) (discussing the asymmetry of language, and insults that tend to be based on women's sexuality).

42. See MATTHEW HALE, *HISTORY OF THE PLEAS OF THE CROWN* 637-39 (1778). See also RUBYA MEHDI, *THE ISLAMIZATION OF THE LAW IN PAKISTAN* 116, § 3.3.1 (1994) (stating that before the *Hudood* ordinances, the penal law of Pakistan included adultery as an offense, but defined it as intercourse by a man with the wife of another without his permission; women were not punished even as abettors); ZIA, *supra* note 18, at 25-26 (stating that under the pre-*Hudood* criminal legal system inherited from the British, a complaint of adultery could only be lodged by the husband); Donald A. Dripps, *Beyond Rape: An Essay on the Difference Between the Presence of Force and the Absence of Consent*, 92 COLUM. L. REV. 1780, 1782 (1992) ("Until the twentieth century, . . . female sexual autonomy had little to do with the law of rape. The law instead struck a balance between the interests of males-in-possession and their predatory counterparts."). The Pakistani Penal Code prior to 1979 borrowed from this English common law of rape. See PAK. PENAL CODE § 375 (1860) (repealed 1979), reprinted in R.A. NELSON, *THE PAKISTAN PENAL CODE* 2109-10 (1975) (legislating and elaborating on rape defined as "the ravishment of a woman without her consent, by force, fear, or fraud," citing English common law precedent).

43. PATEL, *supra* note 11, at 27.

44. See *supra* note 17 and accompanying text.

45. Scroggins, *supra* note 17.

itself easily to manipulation and the development of a tribal attitude where women's bodies become tools for revenge by men against men. Indeed, increasingly in Pakistan, "[i]n cases of revenge against the male members of [a] family, instances have come to light where their women are violated."⁴⁶ Even within a family, physically harming (even killing) women for alleged infidelity or some other embarrassment to the family—often by some sort of burning—is an unfortunate tradition in the Indo-Pakistani subcontinent.⁴⁷ And, as world human rights organizations have documented, "honor killings" of women suspected of sexual indiscretion, carried out by a male family member, are unfortunately not limited to this part of the world.⁴⁸

The Quran, however, has harsh words for the exploitation of women's dignity in this way. As if anticipating the misogynistic tendency of society, the Quran first establishes that there is to be no speculation about a woman's sexual conduct. No one may cast any doubt upon the character of a woman except by formal charges, with very specific, secure evidence (i.e. four eyewitnesses to actual intercourse) that the woman is disrupting *public* decency with her behavior.⁴⁹ If such direct proof does not materialize, then anyone engaging in such a charge is subject to physical punishment for slander. (For even if the information is true, any witness who is not accompanied by another three will be punished for slander).⁵⁰ As for the public at large, they must leave her alone, regardless of the outcome. Where the public refuses to perpetuate rumors, responding instead that: "it is not for us to speak of,"⁵¹ the patriarchal tendency to invest the honor of society in women's sexuality loses force. In the face of any hint of a woman's sexual impropriety, the Quranic response is: walk away. Leave her alone. Leave her dignity intact. The honor of a woman is not a tool, it is her fundamental right.

46. PATEL, *supra* note 11, at 36. See also ZIA, *supra* note 18, at 30 ("The motivation of feudal enmity, revenge for honour via the sexuality of the woman, collusion of male authorities in attributing all blame on the woman, and State sanctioning of control over women even in the extreme form of murder, are all feeding impulses in most sex crimes [in Pakistan]."); Shahla Haeri, *The Politics of Dishonor: Rape and Power in Pakistan*, in FAITH AND FREEDOM: WOMEN'S HUMAN RIGHTS IN THE MUSLIM WORLD 161 (Mahnaz Afkhami ed., 1995) (arguing that "political rape" is a modern version of "feudal" 'honor rape'"); Sarwar, *supra* note 20 ("Women are also considered property, and the repositories of male honor. If a man wants revenge from someone, the surest way is to strike at him through his 'honor'—his wife or daughter.").

47. DISADVANTAGED, *supra* note 20, at 3 (reporting burnings); Sarwar, *supra* note 20 ("In addition, Pakistani society tacitly condones 'honor killings'—the murder of a female relative on suspicion of 'illicit relations.'").

48. See, e.g., AMNESTY INT'L, HUMAN RIGHTS ARE WOMEN'S RIGHTS 92 (1995) (discussing honor killings in Egypt and Iraq).

49. See *supra* notes 36–42 and accompanying text.

50. See *supra* note 37.

51. See *Quran* 24:16–17; *supra* note 39 and accompanying text.

1. Pregnancy as Proof of *Zina*?

Given the Quran's strict standard of proof for a *zina* case, one might now wonder whether the conviction of women like Jehan Mina and Safia Bibi for *zina* on the evidence of their pregnancy alone⁵² could be justified by Islamic law. In traditional Islamic jurisprudence, the majority opinion⁵³ is that pregnancy alone is *not* sufficient evidence to prove *zina*, since the Quran specifies nothing less than four eyewitnesses, and a fundamental principle of Islamic criminal procedure is that the benefit of the doubt lies with the accused.⁵⁴ Other Muslim scholars, however, have held that pregnancy does amount to proof of illegal sexual relations, where the woman is unmarried and has not claimed rape. Imam Malik, and reportedly Ahmad ibn Hanbal, for example, considered unmarried pregnancy *prima facie* evidence of *zina*.⁵⁵ This opinion is based in large part upon the reported positions of the three famous caliphs, Umar ibn al-Khattab, 'Uthman ibn 'Affan, and 'Ali ibn Abi Talib, that "[a]dultery is public when pregnancy appears or confession is made."⁵⁶ The difference of opinion is also due to differing interpretations of the role of circumstantial evidence in *hudood* cases.⁵⁷

52. See *supra* notes 9, 11, and accompanying text.

53. Islamic jurisprudence was developed by jurists whose approaches to and interpretations of the Quran and Sunnah became varying schools of Islamic law. See MAHMASSANI, *supra* note 34, at 15–17. Today, five schools are commonly discussed: the four *Sunni* schools (Hanafi, Maliki, Shafii, and Hanbali) and the *Shii* school (Ja'fari). For more information and background, see *id.* at 15–39.

54. See 8 MUHAMMAD IBN QUDDAMAH AL-MAQDISI, AL-MUGHNI 'ALA MUKHTASAR AL-KHARAQI 129, 145 (Dar al-Kutub al-'Ilmiyyah 1994) (1994) (stating Hanafi and Shafii schools of thought hold that pregnancy alone does not constitute sufficient evidence for punishment of *zina*, but noting that the Maliki school of thought presumes punishment unless there are signs of coercion) [hereinafter AL-MUGHNI]; SIDDIQI, *supra* note 27, at 71 (but citing Umar's reported position that pregnancy furnishes sufficient proof of *zina* against unmarried woman); Seminar, *supra* note 14, at 271 (stating that majority of jurists hold that pregnancy is not *prima facie* evidence of *zina*).

55. See IMAM MALIK, AL-MUWATTA, § 41.4, at 392 ('A'isha 'Abdarahman at-Tarjumana & Ya'qub Johnson trans., 1982) (stating that an unmarried pregnant woman who claims that she was forced to have sex is liable for punishment unless she can prove her claim); SALAMA, *supra* note 29, at 121. See also COULSON, *supra* note 27, at 174–75 (stating that Malikis held pregnancy as *prima facie* evidence of *zina*); EL-AWA, *supra* note 26, at 130–31 ("[T]he offence of *zina* may be proved against an unmarried woman if she is pregnant," citing Maliki jurists who considered circumstantial evidence important and admissible as proof).

56. Salama, *supra* note 29, at 121. See also 3 ABU DAWUD, *supra* note 28, No. 4404 (quoting Umar ibn al-Khattab's statement that fornication exists "when proof is established or if there is pregnancy, or a confession"); 8 AL-BUKHARI, *supra* note 28, Bk. 82, No. 816, at 536–37.

57. Salama, *supra* note 29, at 120–21 (summarizing role of *qara'in* (presumptions, or circumstantial evidence) in *hadd* jurisprudence).

The rationale that “adultery is public with pregnancy” is clearly problematic. Although the rationale does incorporate the concept that the real criminality in *zina* is the public display of adultery, it fails to contemplate the potential discrimination against and harming of women. As a practical evidentiary matter, this perspective does not take into account modern medical advances such as artificial insemination which might be alternative explanations for the pregnancy, not to mention pure force. More substantively, though, it unfairly shifts the burden of proof against women. Forced to prove that the intercourse was nonconsensual in order to avoid a *zina* prosecution, a woman is automatically put in the position of defending her honor against accusations which do not meet the Quranic four-witness requirement. This unfairness is not supported by the spirit of the Quranic verses which discourage presumptions about a woman’s sexual activity by insisting that no presumptions be made without four witnesses to the actual act.⁵⁸ This shift in the burden of proof is even more patently unfair when the pregnant woman is a victim of rape. In that instance, an unmarried pregnant woman must overcome the burden of a *prima facie* case against her simply because the attack has resulted in pregnancy.

Moreover, the Quranic insistence on four witnesses, as we saw earlier, establishes that the *act* of intercourse must be public, not its consequences.⁵⁹ It is public sex which is deterred, not public pregnancy. A pregnant woman looks the same in public, whether the pregnancy occurred from rape, *zina*, or legal marital intercourse, and in modern societies with large populations, it is generally not obvious which of these three applies to a pregnant woman on the street. Nor, indeed, should the public (or courts) speculate without solid eyewitness proof of the actual act of penetration, according to Islamic law. Furthermore, pregnancy is something which only applies to women. If pregnancy alone constitutes sufficient evidence of *zina*, the result seems to forget that the very purpose of the *zina* verses is to protect women’s honor. Women, again, tend to be more susceptible to accusation, and the Quran addresses this susceptibility by directly, enjoining any charges against women without solid proof.⁶⁰ If pregnancy is allowed as sufficient proof of *zina*, a pregnant adulteress will be convicted without any testimonial proof, while her adulterous partner escapes punishment with *his* reputation intact. The woman-affirming spirit of the *zina* verses is lost.

58. See *supra* Part I.B.

59. See *supra* notes 35–41 and accompanying text.

60. See *supra* note 23 and accompanying text.

C. Drafting Problems in the Zina Ordinance

1. The Same Brush: Why Rape as a Form of *Zina*?

As we have seen, the Quranic verses regarding *zina* do not address the concept of *nonconsensual* sex. This omission is a logical one. The *zina* verses establish a crime of public sexual indecency. Rape, on the other hand, is a very different crime. Rape is an inherently reprehensible act which society has an interest in preventing, whether or not it is committed in public. Therefore, rape does not logically belong as a subset of the public indecency crime of *zina*. Unfortunately, however, the *Zina Ordinance* is written exactly counter to this Quranic omission and it includes *zina-bil-jabr* (*zina* by force) as a subcategory of the crime of *zina*.⁶¹

Where did the *zina-bil-jabr* section in the Ordinance come from then, if it is not part of the Quranic law of *zina*? We will see later that in Islamic jurisprudence addressing *zina*, there is significant discussion of whether there is liability for *zina* under duress.⁶² But the language of the *zina-bil-jabr* section in the Pakistani Ordinance does not appear to be drawn from these discussions. (That is, it is not presented as an exception to *zina* in the case of duress). Rather, the *zina-bil-jabr* language is nearly identical to the old common law of rape in Pakistan, the borrowed British criminal law in force in Pakistan before the *Hudood* ordinances. The old common law Pakistani rape statute read:

A man is said to commit "rape" who, except in the cases hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the following descriptions:—

First.—Against her will.

Secondly.—Without her consent.

Thirdly.—With her consent, when her consent has been obtained by putting her in fear of death, or of hurt.

Fourthly.—With her consent when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly.—With or without her consent, when she is under [fourteen] years of age.

61. See *supra* note 5–6 and accompanying text.

62. See *infra* Part II.A.

Explanation.—Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Exception.—Sexual intercourse by a man with his own wife, the wife not being under [thirteen] years of age is not rape.⁶³

With the exception of the statutory rape section (under “Fifthly”), the language specifying what constitutes rape is almost identical to the *zina-bil-jabr* language under the *Hudood* ordinance. Even the explanation that penetration is sufficient to constitute the necessary intercourse is the same. Did the Pakistani legislators, in writing the *zina-bil-jabr* law, simply relabel the old secular law of rape under the Muslim heading of *zina* (as *zina* by force—*jabr*), and re-enact it as part of the *Hudood* Islamization of Pakistan’s laws—right along with the four-witness evidentiary rule unique to *zina*? If so, this cut-and-paste job, albeit a well-intentioned effort to retain rape as a crime in Pakistan’s new *Hudood* criminal code, reveals a limited view of Islamic criminal law which, as illustrated, ultimately harms women.

2. Sexuality and Suspicion

Rape law in the United States has long reflected cultural patriarchal assumptions about female sexuality and consent. A frequent casualty in rape trials is the rape victim’s reputation, as the court attempts to sort out the issue of consent.⁶⁴ This problem is exacerbated in Pakistan because

63. PAK. PENAL CODE § 375 (1860) (repealed 1979), reprinted in NELSON, *supra* note 42, at 2109–10 (1975). For comparison, the *zina-bil-jabr* section reads:

A person is said to commit *zina-bil-jabr* if he or she has sexual intercourse with a woman or man, as the case may be, to whom he or she is not validly married, in any of the following circumstances, namely:—

- (a) against the will of the victim,
- (b) without the consent of the victim,
- (c) with the consent of the victim, when the consent has been obtained by putting the victim in fear of death or of hurt, or
- (d) with the consent of the victim, when the offender knows that the offender is not validly married to the victim and that the consent is given because the victim believes that the offender is another person to whom the victim is or believes herself or himself to be validly married.

Explanation.—Penetration is sufficient to constitute the sexual intercourse necessary to the offence of ‘*zina-bil-jabr*.’

Zina Ordinance § 6; P.L.D. 1979 Cent. Statutes at 52; BOKHARY, *supra* note 3, at 182 (with comment and annotations); MAJOR ACTS, *supra* note 2, at 11–12.

64. See, e.g., Dripps, *supra* note 42.

the convoluted placement of rape as part of the *Zina* Ordinance encourages the use of a woman's unsuccessful claim of rape as some sort of default evidence of *zina*. Thus, there is a strong tendency to suspect any charge of rape to be a "loose woman's" attempt to escape punishment for *zina*. Female sexual stereotypes dangerously fuel these cases. For example, on appeal of one rape conviction, the Pakistani Federal Shariat Court stated:

[W]herever resort to courts is unavoidable for any reason, a general possibility that even though the girl was a willing party to the occurrence, it would hardly be admitted or conceded. In fact it is not uncommon that a woman, who was a willing party, acts as a ravished woman, if she is surprised when in amorous courtship, love-making or in the embrace of a man she has not repulsed.⁶⁵

Such biased and derogatory observations against women by the Islamic court in Pakistan reveal a basic cultural male bias in the perception of women and female sexuality.

This bias also manifests itself in conclusions that a given sexual encounter must have been consensual if there is no physical evidence of resistance by the woman (another issue familiar to rape law reformers in the West). Many Pakistani judgments of rape have been converted into *zina* cases because of the absence of evidence of such resistance.⁶⁶ This stereotypical concept of women supposes that if a woman does not struggle against a sexual assault, then she must be a sexually loose woman—justifying a conversion of the charge to *zina*. This attitude unfairly generalizes human reaction to force and the threat of violence. And, this generalization works to the detriment of women who have been subjected to a rapist's attack and survived only by submitting without physical resistance.

Ironically, this is the exact type of speculation regarding women's sexual activity which the Quran explicitly condemns in the very verses establishing the crime of *zina*.⁶⁷ Judicial and societal speculation about women's sexual looseness clearly does not correspond with the Quranic admonition that "it is not for us to speak of." The intertwining of rape

65. See *Zia*, *supra* note 18, at 29 (quoting Federal Shariat Court); Nausheen Ahmad, *The Other Viewpoint*, DAWN (Karachi, Pak.), Nov. 14–20, 1995, at 8 (weekly *Tuesday Review* supplement) (citing case of alleged rape of fifteen-year-old girl where defendant was acquitted and court described victim as girl of "loose character" who "has a habitual case of enjoying sexual intercourse," reported at P.L.D. 1982 Fed. Shariat Ct. 241 (Pak.)).

66. See Hina Jilani, *Whose Laws?: Human Rights and Violence Against Women in Pakistan*, in FREEDOM FROM VIOLENCE; WOMEN'S STRATEGIES FROM AROUND THE WORLD 63, 72 (Margaret Schuler ed., 1992).

67. See *supra* note 36 and accompanying text.

with *zina* in Pakistan's *Zina* Ordinance, however, encourages such speculation. Rather than constituting a separate violent crime against women, rape—under the title *zina-bil-jabr*—is perceived more as a woman's expected defense to a *zina* charge, and thus subject to judicial speculation.⁶⁸

3. Bearing Witness: Exclusively Male Testimony

We have reviewed the strict Quranic quadruple testimony standard of proof for *zina* cases, and Islamic evidence law regarding the nature of the testimony requiring upright, sane witnesses, and testimony obtained without violation of privacy.⁶⁹ The *Zina* Ordinance of Pakistan, however, adds a limitation on the admissibility of evidence which we have not yet addressed: the witnesses must all be men.⁷⁰ That is, the standard of proof in the *Zina* Ordinance for *zina* or *zina-bil-jabr* is either confession or testimony by "at least four Muslim adult male witnesses."⁷¹

However, the Quranic *zina* verse setting forth the original four-witness requirement is not exclusive to men.⁷² This verse refers to these four witnesses with the Arabic masculine plural, "*shuhada*" (witnesses), which grammatically includes both men and women, unless otherwise indicated.⁷³ The inclusion of the word "male" in the *Zina* Ordinance thus prompts the question: was this interpretation taken from Islamic law or is it a Pakistani cultural gloss on the rule?

Despite the Quranic use of the plural noun inclusive to both men and women, many Islamic jurists and scholars have traditionally limited the four witnesses in a *zina* case to men.⁷⁴ In fact, all major schools of thought have adopted restrictive interpretations of women's ability to testify as witnesses in general, although some (significantly including the

68. See Jilani, *supra* note 66, at 71 ("The offense of rape (*zina-bil-jabr*) is also dealt with by the same law [of *zina*]. The effect of this is that rape has become more of a defense against prosecution for adultery or fornication, rather than being considered as an independent crime.").

69. See *supra* Part I.B.

70. Apparently, the exclusion of female evidence was challenged through a petition in the Federal Shariat Court, but the male only witness requirement still exists in the Ordinance. See MEHDI, *supra* note 42, at 118.

71. See *supra* note 7 and accompanying text.

72. See *supra* text accompanying note 24 (*Quran* 24:4 "Those who defame chaste women and do not bring four witnesses [*shuhada*] should be punished . . .").

73. See AMINA WADUD-MUHSIN, *QURAN AND WOMAN*, Ch. 1 (1992) (discussing Quranic grammar and its emphasis on the duality of men and women).

74. A.D. AJIJOLA, *INTRODUCTION TO ISLAMIC LAW* 134 (2d ed. 1981); EL-AWA, *supra* note 26, at 17, 124–26 (defining *zina* witnesses as four adult men).

famous jurists, al-Tabari, Ibn Taymiyya, and Ibn al-Qayyim) have disagreed.⁷⁵ The rationales accompanying this rule are interesting, however. For example, the *Hedaya* states:

Evidence is of several kinds, that of four men, as has been ordained in the Quran; and the testimony of a woman in such case is not admitted; because . . . 'in the time of the Prophet and his two immediate successors it was an invariable rule to exclude the evidence of women in all cases inducing punishment or retaliation'; and also because the testimony of women involves a degree of doubt, as it is merely a substitute for evidence, being accepted only where the testimony of men cannot be had; and therefore it is not admitted in any matter liable to drop from the existence of doubt.⁷⁶

Although the principle that reasonable doubt should negate convictions of violent crimes is a laudable one, the reasoning leading to it appears to stem from a condescending patriarchal view of women.⁷⁷ This attitude continues even in more modern texts on Islamic law:

In the case of [*zina*] the testimony of four male witnesses is required as a female is weak in character.⁷⁸

[T]he concern of Islamic law for complete truthfulness of evidence and certainty of proof is abundantly clear from its rules of evidence. Avoiding conviction only on a single witness testimony and reluctance to act upon the evidence of women only are indications of the fool-proof system of guilt-determination prescribed by the Qur'an and Sunna[h].⁷⁹

75. See Mohammad Fadel, *Two Women, One Man: Knowledge, Power, and Gender in Medieval Sunni Legal Thought*, 29 INT'L. J. MIDDLE E. STUD. (forthcoming May 1997) (discussing Islamic jurisprudence on women as witnesses, addressing sociological influences on the restrictions on women's testimony, noting alternative interpretations among jurists); Salama, *supra* note 29, at 118 ("All jurists reject the testimony of women," but citing some scholars who accept testimony of women in *zina* cases if there are two women for each man). See also COULSON, *supra* note 27, at 127; EL-AWA, *supra* note 26, at 17, 124-26 (defining *zina* witnesses as four adult men).

76. HEDAYA, *supra* note 30, Bk. XXI, Ch. I, at 353-54.

77. Traditional Muslim jurists have used similar biased reasoning to justify the requirement of two women witnesses for one man in general non-*zina* evidence law. These include: aiding male pride, since the losing party's resentment will be greater if losing to a woman, and protection of society, as the practice of women leaving the home will lead to social disorder and corruption. See Fadel, *supra* note 75.

78. AJIJOLA *supra* note 74, at 134.

79. N.R. Madhava Menon, *Islamic Criminal Jurisprudence and Social Defence [sic.] in the Modern World: An Appreciation*, 1 ISLAMIC & COMP. L.Q. 232, 237 (1981).

[I]t is to be observed that the evidence of women against men is not admissible in wine drinking [prosecutions] because the evidence of females is liable to variation, and they may also be suspected of absence of mind, or forgetfulness.⁸⁰

[Regarding property cases, where two witnesses are required,⁸¹] [t]he Imam al-Shafi'i has said that the evidence of one man and two women cannot be admitted, excepting in cases that relate to property, or its dependencies, such as hire, bail, and so forth, because the evidence of (a) woman is originally inadmissible on account of their weakness of understanding, their want of memory and incapacity of governing, whence it is that their evidence is not admitted in criminal cases.⁸²

[In property cases, where two witnesses are required and the evidence of two women is admissible in place of two men,] [t]he evidence of four women alone, however, is not accepted, contrary to what analogy would suggest, because if it were, there would be frequent occasions for their appearance in public, in order to give evidence; whereas their privacy is the most laudable.⁸³

Assumptions such as these of the lack of memory, incompetence, and general weak character of all women stems from a patriarchal perspective in a male-dominated intellectual community. The Quran, however, does not bear this attitude, as it establishes the equality of men and women before God and the responsibility of both equally as vicegerents of God on earth.⁸⁴ But where cultures are male-dominated, the absence of the active and intelligent participation of women in the public sphere naturally might breed such attitudes, and these have apparently made their way

80. SIDDIQI, *supra* note 27, at 119.

81. See WADUD-MUHSIN, *supra* note 73, at 87, for an alternative analysis of Quranic requirement of two women witnesses for one man, in two-witness-minimum cases.

82. SIDDIQI, *supra* note 27, at 45.

83. HEDAYA, *supra* note 30, Bk. XXI, Ch. I, at 354. Similar patriarchal attitudes towards women manifest themselves even outside discussions of competent witnesses. One modern commentator rationalizes the disparity between husband and wife in ease of obtaining a divorce by saying that, because of emotional instability due to the menstrual cycle, "[i]f women were given the power of unilateral divorce, it is probable that millions of them would divorce their husbands and it is probable that millions of divorces would have ensued and there would be chaos in society." DOI, *supra* note 24, at 95. See also WADUD-MUHSIN, *supra* note, 73, at 35 (citing Zamakhshari's statement that men are preferred by God over women in terms of "intelligence, physical constitution, determination and physical strength").

84. See WADUD-MUHSIN, *supra* note 73, at 34-38, 64-66 (describing equality of women and men laid out in the Quran; distinctions between humans are only on the basis of character, and women are not defined by biology alone).

into the analysis and application of Islamic law in such societies and places in history.

Educated Muslims today, however, would quickly dismiss as simple ignorance any claims that women are inferior in intellectual capacity, memory, or character. As for the societal harmony arguments that women do not venture out into public space, Muslim women today do not necessarily fit into the mold described in these quotes. Nor, indeed, did all women of Muslim history.⁸⁵ To reason that women should not be witnesses to a *zina* or *zina-bil-jabr* case because this would encourage their going out in public is pointless in a society where, for example, the medical evidence in a *zina* prosecution might easily be submitted by a woman doctor, the prosecuting or defense attorney could be a female litigator, and the presiding judge a woman jurist. The caution against women entering public space has long been dropped in most parts of Pakistan, and in other countries of the modern world.

The limitation of testimony exclusively to men appears to be an incorporation into Islamic law of an antiquated custom which has now changed, and in Islamic law, "all rules in the *shari'ah* [Islamic law] that are based upon customs change when customs change."⁸⁶ Modern Islamist writings, in fact, have been instrumental in establishing that such exclusion of women from public space is an unfair cultural practice that is not an inherent part of Islam:

In the 1970s, some Islamists began a serious reexamination of the dominant conservative position. They concluded that the inclusion of women in all facets of the political process was entirely consistent with Islam, that Islam does not require strict segregation of the sexes, and that much of the conservative position was based on custom rather than on the absolute principles of Islam.⁸⁷

85. See IBN HAJJAR AL ASQALANI, *AL ISABA FI TAMYIZ AL SAHABA* 341–42 (1907) (discussing Laila al-Shifa bint Abdullah, who was appointed by Caliph Umar to oversee the Medina marketplace); 2 UMAR KAHHALA, *A'LAM AL-NISA* 300–01 (10th ed. 1991) (also discussing al-Shifa bint Abdullah); KAHHALA, *supra* at 5:67–70 (summarizing biographies of prominent Muslim women, including story of Baghdadi ruler Umm al-Muqtadir billah, who set up a female courtier as judge to hear disputes in the public square, citing Tabari, Ibn Athir, Ibn al-Jawzi, Ibn Miskawih). See also ANWAR AHMAD QADRI, *JUSTICE IN HISTORICAL ISLAM* 57–58 (1968) (describing cases involving women litigants before a male judge); WIEBKE WALTHER, *WOMEN IN ISLAM* (1995) (describing prominent women throughout Muslim history, including Umm al-Muqtadir billah).

86. MAHMASSANI, *supra* note 32, at 116. See also KAMALI, *supra* note 21, at 285 (summarizing changeability of rules where 'urf (custom) has changed, citing al-Shafii's different rules in Iraq versus Egypt).

87. Najib Ghadbian, *Islamists and Women in the Arab World: From Reaction to Reform?*, 12 AM. J. ISLAMIC SOC. SCI. 19, 27 (1995).

Among the many respected leaders of the modern Islamist movement who follow this attitude are Hasan al-Turabi of Sudan, Rachid al-Ghanouchi of Tunisia, and Muhammad al-Ghazali and Yusuf al-Qaradawi of Egypt.⁸⁸

The exclusivity of male testimony as an application of cultural male bias to the Islamic law of *zina* is unfair. But the exclusion of female testimony becomes appalling when expanded to apply to *zina-bil-jabr* as well. It is a clear travesty of justice to deny a victim of rape the right to testify to this violent attack merely because she is a woman. In applying the exclusively male evidence rule of traditional *zina* law to the crime of *zina-bil-jabr*, Pakistan has transformed what was merely an antiquated male bias into a direct violation of the human rights of women. The direct contradiction to the Quranic injunctions to stand up firmly for justice is obvious.

Moreover, depriving women as an entire gender of the right to testify in a *zina* or *zina-bil-jabr* case—where a woman's honor is generally at issue—has serious societal ramifications. First, it prevents women from fulfilling the Islamic duty to bear witness to the truth, repeatedly emphasized in the Quran.⁸⁹ But even more significant is the fact that the permanent rejection of testimony is itself a Quranic *hadd* penalty. That is, in its verse prohibiting slander, the Quran establishes that deprivation of the right to testify is a severe punishment—one of the two consequences of falsely accusing a woman:

Those who defame chaste women, and do not bring four witnesses, should be punished with eighty lashes, and *their testimony should not be accepted afterwards*, for they are profligates.⁹⁰

88. See *id.* at 27 (citing Hasan al-Turabi's paper, "Women in Islam and Muslim Society," which "laid down the theoretical basis of the reformist approach to gender relations, endorsed unequivocally a fully participatory role for women in politics and in every other sphere of society and declared that traditional restrictions on women's freedoms had nothing to do with Islam."); *id.* (quoting al-Ghanouchi's statement: "We began to ask ourselves sheepishly, to what extent does our movement express Islam's approach to women, and to what extent have we freed ourselves from the residue of the era of decline and from our reactions against the Bourgeois degeneracy?"); *id.* at 28 (citing al-Ghazali's book, *AL SUNNAH AL NABAWIYAH BAYN AHL AL FIQH WA AHL AL HADITH*, which focuses on verses and *hadith* which conservatives interpret as excluding women from positions of authority, and asserting that "some authentic juristic interpretations of Islamic law allow women to serve in any public capacity—as judges, ambassadors, cabinet members, and rulers"); *id.* (citing 1990 *fatwa* (ruling) of Yusuf al-Qaradawi that women can seek parliamentary and judicial positions, and issue *fatwas* with the same authority as men).

89. See, e.g., *Quran* 4:135 ("O you who believe, be custodians of justice (and) witnesses for God, even though against yourselves, or your parents or your relatives . . . and if you perjure or avoid (giving evidence), God is cognizant of all that you do.").

90. *Quran* 24:4 (emphasis added).

A law which disallows women's testimony in *zina* cases, then, is tantamount to sentencing all women to one of the Quranic punishments for slander. This is ironic given the fact that the slander verse is specifically addressed to the preservation of women's honor—something that is stripped when one's testimony is not accepted. As one commentator puts it, "in a Muslim society the rejection of an individual's testimony is tantamount to outlawing him, [and thus] the rejection of the testimony of one who has committed a *hadd* offence is a deterrent measure."⁹¹ Elimination of all female testimony in *zina* cases thus subjects women to part of the same punishment as if they had committed a *hadd* crime, the most serious type of offense in Islamic law. Quite different from honoring women, as the Quran dictates, this practice dishonors all women by insinuating incompetence and weakness of character—the same qualities attributed to a slanderous witness.

Finally, this rule creates a practical problem. If the rationale for rejecting a slanderer's testimony is deterrence, then why not also apply this deterrence to stop women from slandering each other? That is, if women's testimony is automatically inadmissible, then a woman will naturally not be deterred by the injunction that a slanderer's testimony will no longer be admitted. Hence, the Quranic *hadd* punishment for the offense of slander (that the slanderer's testimony is rejected ever after) becomes meaningless to women. Certainly the punishment of flogging may yet be a deterrent, but why, then, is there the additional punishment of rejecting future testimony? And why would it apply only to men? The Quran gives no indication that it means to deter women any less than men in its injunctions against slander.⁹² To simply nullify part of the Quranic punishment for slander, then, seems quite a radical result to be based merely on outdated cultural attitudes regarding women's competence and societal place.

4. Problems with *Zina* as *Ta'zir*

Islamic criminal law acknowledges two categories of crime and punishment. The first, known as *hudood*, encompasses crimes specifically articulated by God in the Quran and through the *hadith*. Islamic jurisprudence acknowledges, however, that society may legislate additional crimes and punishments as needed. These societally legislated crimes and

91. EL-AWA, *supra* note 26, at 34.

92. See *supra* note 37 and accompanying text.

punishments are called "*ta'zir*." *Ta'zir* crimes can sometimes carry much lighter evidentiary or sentencing schemes than Quranic *huddood* crimes.⁹³ In Pakistan, when the strict quadruple witness standard of proof is difficult to meet, it has become increasingly common for *zina* cases to be prosecuted as *ta'zir* crimes, as opposed to *huddood* crimes.⁹⁴ The *Zina* Ordinance includes a clause providing for *ta'zir* prosecutions of *zina* where there is less evidence:

Zina or *zina-bil-jabr* liable to *tazir*.—

. . . [W]hoever commits *zina* or *zina-bil-jabr* which is not liable to *hadd*, or for which proof in either of the forms mentioned . . . [i.e. confession or four witnesses] is not available and the punishment of *qazf* (slander) liable to *hadd* has not been awarded to the complainant, or for which *hadd* may not be enforced under this Ordinance, shall be liable to *tazir*.⁹⁵

One seemingly positive aspect of *ta'zir* rape prosecutions in Pakistan is that the relaxed evidentiary rules allow women's testimony, as well as various forms of circumstantial evidence not allowed in a *hadd* prosecution. However, the actual impact upon women in *zina* cases has not been positive. One writer states:

Even though this level of punishment permits the testimony of women, observers of Pakistan's legal system have noted the bias against women victims and defendants. Courts appear to extend the benefit of doubt to men accused of rape. However, they set rigorous standards of proof to female rape victims who allege that the intercourse was forced. This gender bias has resulted in: (1) women who find it so difficult to prove *zina-bil-jabr* [under the *huddood* require-

93. For further explanation and distinction between *hadd* and *ta'zir* crimes in Islamic law, see COULSON, *supra* note 27, at 124; EL-AWA, *supra* note 26, at 1-2; SIDDIQI, *supra* note 27, at 158; Mohammed S. El-Awa, *Ta'zir in the Islamic Penal System I*, 6 J. ISLAMIC & COMP. L. 41 (1976).

94. See U.S. DEP'T OF STATE, *supra* note 20, at 1372 ("[i]n contrast to past years, women are now frequently granted bail for *Haddood* offenses, and convictions have been markedly reduced"); DOUBLE JEOPARDY, *supra* note 12, at 50-52; Mehdi, *supra* note 10, at 23 (stating that under working law of rape, almost all cases are tried under *ta'zir*); Anika Rahman, *A View Towards Women's Reproductive Rights Perspective on Selected Laws and Policies in Pakistan*, 15 WHITTIER L. REV. 981, 999-1000 (1994) ("Because of the difficulty of obtaining four male Muslim witnesses, men accused of *zina-bil-jabr* have in reality, become exempted from the maximum punishment. Although maximum *Hadd* punishments have been imposed, none have ever been carried out. The majority of *zina* or *zina-bil-jabr* cases are thus heard at the lesser *Tazir* punishment level.").

95. *Zina* Ordinance § 10; P.L.D. 1979 Cent. Statutes at 53; MAJOR ACTS, *supra* note 2, at 13. The section goes on to prescribe the punishment for *zina* of imprisonment for ten years, thirty lashes, and a fine, and for *zina-bil-jabr* twenty-five years imprisonment and thirty lashes.

ment of four male witnesses] that they find themselves open to the possibility of prosecution for *zina* [under the relaxed *ta'zir* evidentiary rules]; (2) men accused of *zina-bil-jabr* being subject to diminished charges [because the *hudoood* evidence is not proved]; and (3) women who are wrongfully prosecuted and who are afforded restricted protection against such prosecution.⁹⁶

Thus, the relaxed evidentiary rules of *ta'zir* (corresponding to its lesser punishment) open the *zina* law to further manipulation by authorities, who may threaten a woman with prosecution for *zina* under *ta'zir* evidence if there is not enough proof to convict under *hudoood*. If the woman is charging rape, this exacerbates the potential injustice of the situation. A woman might watch her rapist be acquitted for lack of four witnesses, but herself be subject to prosecution for *zina* under the looser evidentiary rules of *ta'zir*.

This phenomenon should sound familiar:

Those who defame chaste women, and do not bring four witnesses, should be punished with eighty lashes, and their testimony should not be accepted afterwards, for they are profligates.⁹⁷

This is the Quranic verse which started our *zina* discussion. It contemplates the possibility of adultery charges being brought against women upon less evidence than four witnesses, and condemns it as a grievous slander. By allowing prosecution for *zina* as a *ta'zir* punishment, and thereby loosening the evidentiary rules, the Pakistani *Zina* Ordinance has succeeded in contravening the very Quranic verse upon which it is based.⁹⁸ In fact, *zina* is the only *hadd* crime for which the Quran sets out a specific punishment for not meeting its strict evidentiary rules.⁹⁹ The Quran thus indicates that, unlike other *hadd* crimes, there can be no *ta'zir* punishment for *zina*. That is, for this one crime, if four eyewitnesses are not produced, the state and society must walk away and not speak of it again.¹⁰⁰

But the *Zina* Ordinance goes even further in ignoring the Quranic injunction of all-or-nothing proof of *zina*. It includes a provision for

96. Rahman, *supra* note 94, at 1000.

97. *Quran* 24:4.

98. See also PATEL, *supra* note 11, at 30–31 (making same argument that there can be no *ta'zir* punishment for *zina*). This argument, in fact, was the basis of a challenge to the *ta'zir* punishment implemented in *zina* cases in Pakistan. *Id.* (citing 1983 petition challenging §§ 9(a) and 10 of the *Zina* Ordinance on this ground).

99. See AL-SHAFI'I, *supra* note 24, at 247 (“[o]nly the witnesses in the case of adultery should be scourged.”).

100. See *supra* Part I.B.

“attempt” of *zina*, setting forth punishment of imprisonment, whipping, and a fine.¹⁰¹ Again, this directly contradicts the spirit of the Islamic law of *zina*. Both the Quranic verses quoted above and the *hadith* of Prophet Muhammad establish that unless the act was actual penetration, it is not punishable by the state.¹⁰²

There is a compelling Quranic spirit against either a *ta'zir* or an attempt version of *zina*. Unfortunately, the Pakistani *Zina* Ordinance has lost sight of the unique status of *zina* as a *hadd* crime of public indecency and expanded it to areas which inevitably result in injustice and discrimination against women—the focus of the Quranic verses on the subject in the first place.

II. RAPE IN ISLAMIC JURISPRUDENCE

In this critique of the Pakistani *Zina* Ordinance, I have demonstrated that the crime of *zina* set forth in the Quran is primarily a societal crime of public indecency, and for that reason strict evidentiary standards of proof are attached to its prosecution. We have also seen that some of the application of the Quranic evidentiary standard for *zina* has been skewed by patriarchal culture to the detriment of women's rights. The inadmissibility of women's testimony in *zina* cases, including rape prosecutions, is one such example. The creation of a *ta'zir* version of *zina*, and the subcategorization of rape under *zina* in the first place are other examples of aspects of Pakistan's *zina* law which unfairly dishonors its women.

So far, we have seen that the rationale for the strict evidentiary requirements for *zina* is an affirmation and protection of both female and male honor: unlawful sexual intercourse will be prosecuted by the state only when it is publicly indecent. Within the privacy of one's home, the immorality of the act is something left between the individual and God. The same rationale would not, however, apply to the crime of rape. In rape, public display is not the crucial element to the criminality of the act. Rather, the attack itself is a crime of violence, whether committed in public or in private. Rape is not consensual sexual intercourse, but a violent assault against a victim, man or woman, boy or girl, where the perpetrator uses sex as a weapon. Consistent with our analysis thus far, the Quran does not include any direct mention of rape under the general crime of *zina*. How, then, has Islamic law addressed the crime of rape?

101. See *Zina* Ordinance § 18; P.L.D. 1979 Cent. Statutes at 55; MAJOR ACTS, *supra* note 2, at 14–15.

102. See *supra* note 27 and accompanying text.

A. Duress: Rape as a Negation of Intent for Zina

In their chapters on *zina*, Islamic legal scholars have acknowledged that where one or more parties engaged in *zina* under duress, they are not liable for *zina*.¹⁰³ A *hadith* of the Prophet Muhammad establishes this principle: upon a woman's reporting to him that she was forced to commit adultery, he did not punish her, and he did punish the perpetrator.¹⁰⁴ Similar rulings by the Caliph Umar ibn Al-Khattab¹⁰⁵ and Imam Malik¹⁰⁶ further cement this principle in Islamic law. Islamic jurisprudence, in fact, devotes much attention to the concept of duress as a negation of intent, thus eliminating liability for an offense.¹⁰⁷ The application of the law of duress to *zina* has led to a thorough analysis of liability in possible permutations of forced *zina*. For example, the *Hedaya* devotes several paragraphs to resolving conflicting stories regarding a sexual encounter where one party claims it was consensual, and the other claims it was not.¹⁰⁸ Matters become more complicated where the witnesses to the encounter are of different genders.¹⁰⁹ There is also discussion and difference of opinion as to whether a man can be forced to commit *zina* and thus not be liable for *hadd* punishment.¹¹⁰

Thus, the discussions of forced sex in jurisprudential writings on *zina* exhaustively discuss nonconsensual sex as a negation of the requisite mental state for *zina*, but does Islamic law address rape as an independent crime? As it turns out, contrary to what the Pakistani legislation would suggest, Islamic jurisprudence has in fact not only categorized rape as a separate criminal offense (under *hiraba*), but has also allowed civil compensation to rape survivors (under *jirah*). These two remedies are addressed in turn.

103. See HEDAYA, *supra* note 30, Bk. VII, Ch. II, at 187 (defining compulsion generally); 8 AL-MUGHNI, *supra* note 54, at 129, 145 (including discussion of exemption from *zina* liability for male forced to commit *zina*); Seminar, *supra* note 14, at 269 ("[it] is an agreed position that females subjected to rape against their consent and without their will would be exonerated from any liability under Islamic law.").

104. See 9 AL-BUKHARI, *supra* note 28, Bk. 82, Ch. 7; 1 MISHKAT AL-MASABIH 762 (James Robson trans., 2d ed. 1990) (citing *hadith* transmitted by Tirmidhi and Abu Dawud).

105. See MALIK, *supra* note 55, § 41.3, at 392 (citing case where Caliph Umar prosecuted rapist of slave girl and did not prosecute her); 8 AL-MUGHNI, *supra* note 54, at 129 (citing case where Caliph Umar released woman who asserted rape).

106. See MALIK, *supra* note 55, § 41.3, at 392.

107. See generally, Khaled Abou El Fadl, *Law of Duress in Islamic Law and Common Law: A Comparative Study*, 30 ISLAMIC STUD. 305 (1991).

108. HEDAYA, *supra* note 30, Bks. VII, XXI, at 189-95, 353-54.

109. *Id.*

110. *Id.* at 187. See also 8 AL-MUGHNI, *supra* note 54, at 129.

B. Hiraba: Rape as a Violent Taking

Hiraba is another *hadd* crime defined in the Quran. It is variously translated as “forcible taking,” “highway robbery,” “terrorism,” or “waging war against the state.” The crime of *hiraba* is based on the following Quranic verse:

The punishment for those who wage war [*yuharibuna*] against God and His Prophet, and perpetrate disorders in the land is: kill or hang them, or have a hand on one side and a foot on the other cut off or banish them from the land.¹¹¹

Islamic legal scholars have interpreted this crime to be any type of forcible assault upon the people involving some sort of taking of property.¹¹² It differs from ordinary theft in that the Quranic crime of theft (*sariqa*) is a taking by stealth whereas *hiraba* is a taking by force.¹¹³ (Thus, the popular translation as “armed robbery.”) Although it is generally assumed to be violent public harassment, many scholars have held that it is not limited to acts committed in public places.¹¹⁴

It is in the discussions of the crime of *hiraba* where the crime of rape appears. A brief review of the traditional descriptions of *hiraba* reveals that rape is specifically included among its various forms. In *Fiqh-us-Sunnah*, a modern summary of the primary traditional schools of thought on Islamic law, *hiraba* is described as: a single person or group of people causing public disruption, killing, forcibly taking property or money, attacking or raping women (“*hatk al ‘arad*”), killing cattle, or disrupting agriculture.¹¹⁵ Reports of individual scholars on the subject further confirm the *hiraba* classification of rape.¹¹⁶ Al-Dasuqi, for example, a

111. *Quran* 5:33.

112. See EL-AWA, *supra* note 26, at 7–10; 5 ABDUR RAHMAN AL-HARIRI, *KITAB AL-FIQH ‘ALA AL-MATHAHIB AL-‘ARBA’A* 409–11 (1986) [hereinafter *FIQH AL-MATHAHIB*]; 2 SAYED SABIQ, *FIQH-US-SUNNAH* 446 (10th ed. 1993) (chapter on *hudood*, describing *hiraba*) [hereinafter *FIQH-US-SUNNAH*]; SIDDIQI, *supra* note 27, at 139–44. See also DOI, *supra* note 1, at 250 (explaining context of verse revelation: some people came to Muhammad under the auspices of new converts, complained that the weather in Medina was disagreeable to them, and Muhammad sent them to live outside the city with cattle belonging to the state; they subsequently killed the cattle keeper and stole the cattle and this verse was revealed shortly thereafter).

113. See DOI, *supra* note 1, at 250, 254; EL-AWA, *supra* note 26, at 7.

114. 2 *FIQH-US-SUNNAH*, *supra* note 112, at 447.

115. *Id.* at 450.

116. 5 *FIQH AL-MATHAHIB*, *supra* note 112, at 410–11 (summarizing Maliki school definition of *hiraba* offender as someone who “obstructs the road, even without intending to take money, intending to harm someone, or intending to rape a woman (*‘hatk-il-harim’*)”).

Maliki jurist, held that if a person forced a woman to have sex, their actions would be deemed as committing *hiraba*.¹¹⁷ In addition, the Maliki judge Ibn 'Arabi, relates a story in which a group was attacked and a woman in their party raped. Responding to the argument that the crime did not constitute *hiraba* because no money was taken and no weapons used, Ibn 'Arabi replied indignantly that "*hiraba* with the private parts" is much worse than a *hiraba* involving the taking of money, and that anyone would rather be subjected to the latter than the former.¹¹⁸ The famous Spanish Muslim jurist, Ibn Hazm, a follower of the Zahiri school, reportedly had the widest definition of *hiraba*, defining a *hiraba* offender as:

[O]ne who puts people in fear on the road, whether or not with a weapon, at night or day, in urban areas or in open spaces, in the palace of a caliph or a mosque, with or without accomplices, in the desert or in the village, in a large or small city, with one or more people . . . making people fear that they'll be killed, or have money taken, or be raped ("*hatk al 'arad*") . . . whether the attackers are one or many."¹¹⁹

Thus, even this cursory review of traditional Islamic jurisprudence shows that the crime of rape is classified not as a subcategory of *zina*, but rather as a separate crime of violence under *hiraba*. In Islam, sexual autonomy and pleasure is a fundamental right for women as well as men;¹²⁰ taking by force someone's right to control the sexual activity of one's body is thus logically classified as a form of *hiraba*.¹²¹

117. DOI, *supra* note 1, at 253.

118. See 2 FIQH-US-SUNNAH, *supra* note 112, at 450.

119. *Id.*

120. See 7 AL-BUKHARI, *supra* note 28, Nos. 135–36; 2 AL-GHAZZALI, IHYA-ULUM-UD-DIN [MARRIAGE AND SEXUALITY IN ISLAM] 106–107 (Madelain Farah trans., 1984) (book on etiquette of marriage, citing *hadith* re: rights of wife for sexual pleasure); B.F. MUSULLAM, SEX AND SOCIETY IN ISLAM 28–38 (1983) (including *hadith* and discussion of contraception if it interferes with wife's sexual satisfaction); Azizah al-Hibri, *A Study of Islamic Herstory: or How Did We Ever Get Into This Mess?*, in WOMEN AND ISLAM 213 (Azizah al-Hibri ed., 1982) (citing *hadith* about foreplay); Symposium, *Religious Law: Roman, Catholic, Islamic, and Jewish Treatment of Familial Issues, Including Education, Abortion, In Vitro Fertilization, Prenuptial Agreements, Contraception, and Marital Fraud*, 16 LOYOLA INT'L & COMP. L.J. 10, 92 (citing schools of thought on role of woman's sexual pleasure in legality of marriage contract).

121. It is interesting to note that the concept of a woman's sexuality as her property is in fact not a new one to the crime of rape. The western crime of rape evolved from the early Roman law of "raptus" which was defined as "a form of violent theft that could apply to both property and person." Dolly F. Alexander, Comment, *Twenty Years of Morgan: A Criticism of the Subjectivist View of Mens Rea and Rape in Great Britain*, 7 PACE INT'L L. REV. 207, 212 (1995). See also Dripps, *supra* note 42, at 1781. Note that this principle could also be applied to expand the Islamic law of rape to include the rape of men as another instance of the violent taking of an individual's sexual autonomy.

Moreover, classification of rape under *hiraba* promotes the principle of honoring women's sexual dignity established in the Quranic verses on *zina*. Rape as *hiraba* is a separate violent crime which uses sexual intercourse as a weapon. The focus in a *hiraba* prosecution would thus be the accused rapist and his intent and physical actions, rather than second-guessing the consent of the rape victim, as we have seen is likely to happen in a *zina-bil-jabr* case.¹²²

Finally, *hiraba* does not require four witnesses to prove the offense, unlike *zina*. Circumstantial evidence and expert testimony, then, presumably form the evidence used to prosecute such crimes. In addition to eyewitness testimony, medical data and expert testimony, a modern *hiraba* prosecution of rape would likely take advantage of modern technological advances such as forensic and DNA testing.

C. Jirah: Rape as Bodily Harm

Islamic legal responses to rape are not limited to a criminal prosecution for *hiraba*. Islamic jurisprudence also creates an avenue for civil redress for a rape survivor in its law of "*jirah*" (wounds). Islamic law designates ownership rights to each part of one's body, and a right to corresponding compensation for any harm done unlawfully to any of those parts.¹²³ Islamic criminal law calls this the law of *jirah*. Harm to a sexual organ, therefore, entitles the person harmed to appropriate financial compensation under classical Islamic *jirah* jurisprudence.¹²⁴ Thus, each school of Islamic law has held that where a woman is harmed through sexual intercourse (some include marital intercourse), she is entitled to financial compensation for the harm. Further, where this intercourse was *without the consent* of the woman, the perpetrator must pay the woman both the basic compensation for the harm, as well as an additional amount based on the *diyya* (financial compensation for murder, akin to a wrongful death payment).¹²⁵

Since rape could occur even without a clear threat of *physical* force (i.e. thus perhaps not constituting *hiraba*, but nonetheless constituting sex without consent), the categorization of rape under the Islamic law of *jirah*

122. See *supra* Part I.C.2.

123. See 8 AL-MUGHNI, *supra* note 54, at 3 (introduction; describing law of *jirah*, classification of injuries, etc.).

124. *Id.* at 36. Note that the law of *jirah* (in addition to other principles of Islamic law) providing for compensation for physical harm even between spouses would support modern Islamic legislation against domestic abuse.

125. *Id.* (discussing varying applications of *jirah* under four *Sunni* schools of thought); BOKHARY, *supra* note 2, at 219 (stating where someone is forced to commit *zina*, she is not punished for *zina*, but rather entitled to compensation).

also makes logical sense. This categorization would provide financial compensation to every victim of rape for any harm done to their body as a result of the attack. Taking the analysis further, because the right to control one's own sexual activity is a fundamental Islamic and human right,¹²⁶ it could be argued that invasion of one's sexual organs against one's will constitutes harm, even where there is no physical bruising or tearing. Modern Islamic jurisprudence and legislation could therefore choose to provide that either instead of, or in addition to *hiraba* punishment against the rapist, a woman might also claim compensation for her ordeal under the principle of *jirah*.¹²⁷

Interestingly, Western legal discourse has just recently begun to reevaluate the crime of rape, and is still struggling to overcome its male-oriented articulation of the crime. If Islamic jurisprudence were to continue its development in the direction outlined above, *jirah* principles provide an interesting alternative remedy. Islamic law has the unique resource of a *jirah* system of established bodily compensation law to apply as one response to the crime of nonconsensual intercourse, if it were recognized in modern Islamic legislation. In Western history, ancient Roman law also recognized compensation as a means of resolving a rape dispute, but it took a more patriarchal approach: it found that the *father* (or other male authority) of the rape victim was owed damages because rape implied his inability to protect the woman.¹²⁸ Islamic law, with its radical introduction of a woman's right to own property as a fundamental right, already employs a gender-egalitarian attitude in this area of jurisprudence. In fact, there is a *hadith* specifically directed to transforming the early Muslim population out of this patriarchal attitude of male financial compensation for female sexual activity. During the time of Prophet Muhammad, a young man committed *zina* with his employer's wife. The father of the young man gave one hundred goats and a maid as compensation to the employer, who accepted it. When the case was reported to the Prophet, he ordered the return of the goats and the maid to the young man's father and prosecuted the adulterer for *zina*.¹²⁹ Early Islam thus established that there should be no tolerance of the attitude that a woman's sexual activity is something to be bartered, pawned, or owned by the men in her life. Personal responsibility of every human being for his or her own actions is a fundamental principle in Islamic thought.

126. See *supra* note 120.

127. Again, this analysis would also provide for male rape victims.

128. See Dripps, *supra* note 42, at 1780-81.

129. 3 ABU DAWUD, *supra* note 28, Bk. 33, No. 4430; 8 AL-BUKHARI, *supra* note 28, Bk. 81, Nos. 815, 821, 826.

Recent discussions of marital rape among Western scholars¹³⁰ can also be compared to the debate among Islamic legal scholars regarding whether a husband is obligated to pay his wife when she is physically harmed from sexual intercourse brings up an interesting question: Is there a recognition of marital rape in Islam.¹³¹ In the context of *jirah*, it would appear so: where there is any physical harm caused to a spouse, there may be a claim for *jirah* compensation.¹³² Even in these discussions of appropriate *jirah* compensation, the question the injured party's consent plays a central role. Some Islamic jurists considered consent to be presumed by virtue of the marital relationship, while others maintained that where harm occurs, it is an assault, regardless of the consent, and therefore compensation is due.¹³³ In our modern era, one might take these precedents and their premium focus on consent and apply the Islamic principle of sexual autonomy to conclude that any sex without consent is harmful, as a dishonoring of the unwilling party's sexual autonomy. Thus, modern Islamic jurists and legislators, taking a gender-egalitarian perspective, might conclude that Islamic law does recognize marital rape, and assign the appropriate injunctions and compensation for this personally devastating harm.

CONCLUSION: A MODERN ISLAMIC GENDER- EGALITARIAN LAW OF RAPE?

And so we return to the initial question: *do* Pakistan's criminal laws articulate the Islamic law of rape? We have seen that they do not. But they could have. Islamic jurisprudence includes a law of rape with two very appropriate avenues to justly respond to the crime, its seriousness, and its effect on women in particular. Unfortunately, the drafters of Pakistan's *Hudood* Ordinance and the Shariah court which implemented it took no notice of this precedent in creating Pakistan's *zina* law. The result has been injustice to the women of Pakistan, and a disservice to Islamic law. This brief investigation into some of the traditional Islamic

130. See, e.g., Cassandra M. DeLaMothe, Note, *Liberta Revisited: A Call to Repeal the Marital Exemption for all Sex Offenses in New York's Penal Law*, 23 FORDHAM URB. L.J. 857 (1996).

131. Notably, the Pakistani *Zina* Ordinance categorically eliminates this possibility, by defining *zina-bil-jabr* as unconsensual intercourse with someone "to whom he or she is not validly married." See *supra* note 7 and accompanying text (a description also popular in old common law definitions of rape).

132. See *supra* note 124 and accompanying text.

133. See 8 AL-MUGHNI, *supra* note 54, at 36. See also Jilani, *supra* note 66, at 73 (citing case where medical evidence revealed marks of violence on woman's body, but found no rape due to existence of marriage certificate: "[a]t best, it can be said to be misuse of the wife," said the court).

jurisprudence on rape shows that it is more than feasible for modern Muslim legislators to take the tools offered in Islamic jurisprudence on *hiraba* and *jirah* to form a comprehensive gender-egalitarian law of rape, one which does not counteract the positive honoring of women which is inherent in the Quranic verses on *zina*. Rape should be specified as a form of *hiraba* in the *hiraba* section of modern *hudood* statutes, thus identifying it as a violent crime for which the perpetrator is subject to serious punishment. In fact, Pakistan already has a *hiraba* chapter in its *Hudood Ordinance*.¹³⁴ Modern Islamic legislation might also designate rape as a harm under *jirah*, thus creating grounds for rape victims to receive some compensation for the harm caused to their bodies and sexual autonomy.

Modern Islamic jurists, legislatures, members of the judiciary and the bar must work out the logistical details of these laws, and what combination of *hiraba* and *jirah* should apply in a given situation and society. A greater challenge, perhaps, is changing the cultural attitudes towards women which helped to create the existing laws in the first place. That ongoing effort must be undertaken simultaneously with any official legislative changes, in order to give real effect to such legislation, and to give life to the Quranic verses honoring women.

134. See MAJOR ACTS, *supra* note 2, at 7.